ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

1983 TERM

No. 83-95

ERNEST S. PATTON, Superintendent,
SCI-CAMP HILL, and HARVEY BARTLE, III,
Attorney General of the Commonwealth
of Pennsylvania,

Petitioners

v.

JON E. YOUNT,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

GEORGE E. SCHUMACHER
Federal Public Defender

590 Centre City Tower
650 Smithfield Street
Pittsburgh, Pennsylvania 15222
412/644-6565
FTS/722-6565

Counsel for respondent,
JON E. YOUNT

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Jon E. Yount, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Third Circuit's opinion of May 10, 1983 in this case.

QUESTIONS PRESENTED

1. WHETHER PUBLICITY BEFORE RESPONDENT'S RETRIAL REVEALED PREJUDICIAL INFORMATION FROM HIS FIRST TRIAL, INFORMATION THAT WAS NOT OFFICIALLY IN EVIDENCE AGAINST HIM AT RETRIAL, WHICH POISONED THE GENERAL ATMOSPHERE OF THE COMMUNITY AND, THEREFORE, CAUSED AN ACTUAL PREJUDICE IN THE JURORS THAT INFRINGED ON HIS ABILITY TO SELECT AND IMPANEL A FAIR AND IMPARTIAL JURY AS REQUIRED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. (ANSWERED IN THE AFFIRMATIVE BY THE UNITED STATES COURT OF APPEALS FOR THE

THIRD CIRCUIT).

2. WHETHER A FEDERAL COURT, IN REVIEWING A STATE COURT CONVICTION BY WAY OF A HABEAS CORPUS PETITION, MAY INDEPENDENTLY EVALUATE THE MIXED QUESTION OF LAW AND FACT REGARDING A VENIREMEN'S OPINION, AND AS A RESULT OF THAT INDEPENDENT EVALUATION, DISREGARD JURORS' EQUIVOCAL ASSURANCES OF IMPARTIALITY AND FIND THAT THE DEFENDANT WAS DENIED A FAIR AND IMPARTIAL JURY AS REQUIRED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. (ANSWERED IN THE AFFIRMATIVE BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT).

3. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY APPLIED TO A STATE COURT CONVICTION THE STANDARDS REGARDING JUROR PREJUDICE SET FORTH IN MURPHY v. FLORIDA, 421 U.S. 794 (1975). (RESPONDENT RESPECTFULLY SUBMITS THE ANSWER TO THIS QUESTION TO BE IN THE AFFIRMATIVE).

STATEMENT OF THE CASE

On April 28, 1966, the body of Pamela Sue Rimer, an 18-year-old senior at DuBois Area High School, was found shortly after her death in a wooded area near her home in Luthersburg, Clearfield County, Pennsylvania. There were several non-fatal wounds about her head, apparently caused by a blunt instrument, and cuts on her neck, throat and fingers of her left hand caused by a sharp instrument. An autopsy showed that she had died of strangulation when blood from the neck and throat wounds was drawn into her lungs. Except for a stocking, which was tied loosely around her neck, and a shoe, she remained fully clothed; the autopsy revealed no indication that she had been sexually assaulted.

Respondent, Jon E. Yount, surrended to the Pennsylvania State Police and was arrested on April 29, 1966, on a charge of murder and rape. He was convicted on October 7, 1966, of first-degree murder and rape in the Court of Oyer and Terminer and General Jail Delivery of Clearfield County; the jury pronounced sentence as life imprisonment. The trial court denied post-trial motions; on direct appeal the Pennsylvania Supreme Court determined that respondent had not received adequate warnings against self-incrimination, reversed the judgment of sentence and granted a new trial. Commonwealth v. Yount, 435 Pa. 276, 256 A.2d 464 (1969), cert denied, 397 U.S. 925 (1970).

On May 5, 1970, respondent requested a change of venue for retrial claiming that publicity that had saturated the county since the homicide, the continuing discussion of the case among residents, and the dissemination of prejudicial information outside of evidence was so widespread that prejudice against him could not be eradicated from the minds of potential jurors. The trial court denied the petition for change of venue on September 21, 1970, finding that

after the initiation of the appeal the newspapers had merely publicized the actions of the courts "without editorial comment of any kind."

Jury selection for the retrial began on November 4, 1970 and took eleven days, seven jury panels and 1186 pages of testimony. Respondent orally moved for a change of venue following the exhaustion of each panel of jurors; each motion was orally denied by the trial court. On November 13, 1970, a second petition for change of venue was filed by respondent during jury selection; however, the trial court, following a hearing, denied the motion by memorandum and order of the court dated November 14, 1970, stating that "almost all, if not all, jurors seated had no prior or present fixed opinions."

The rape charge against respondent was quashed; retrial for murder began November 17, 1970, and on November 20, 1970, the jury returned a verdict of guilty of murder of the first degree. The trial court denied post-trial motions and the Pennsylvania Supreme Court affirmed the judgment of sentence on direct appeal. Commonwealth v. Yount, 455 Pa. 303, 314 A.2s 242 (1974).

On January 5, 1981, respondent filed a petition for writ of habeas corpus in the United States District Court alleging, inter alia, that his conviction had been obtained in violation of his sixth and fourteenth amendment right to a fair trial by an impartial jury. Following two evidentiary hearings on November 3 and December 28, 1981, the federal magistrate recommended that the petition be granted because respondent had been denied a fair and impartial jury. On April 22, 1982, the district court rejected the magistrate's recommendation and denied the

petition. Yount v. Patton, 537 F.Supp. 873 (W.D.Pa. 1982).

Respondent filed a notice of appeal with the United States Court of Appeals for the Third Circuit; oral arguments were held on December 17, 1982, and on May 10, 1983, that court held that he had shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County, vacated the district court's order and remanded the case to the district court with the direction that a writ of habeas corpus shall issue unless within a reasonable time the Commonwealth affords respondent a new trial.

REASONS WHY THE WRIT SHOULD BE DENIED

The Sixth Amendment to the Constitution of the United States guarantees to the accused the right to be tried "by an impartial jury." Under the Due Process Clause of the Fourteenth Amendment, the states are required to effectuate that right by giving "a fair trial to the accused by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). Petitioner attempts to circumvent evidence that pre-retrial radio, television and newspaper coverage regarding extra-record information had so prejudiced the community of Clearfield County against the accused that a fair trial by an impartial and "indifferent" jury was impossible in that charged atmosphere. The United States Court of appeals for the Third Circuit, when considering respondent's contention that pretrial publicity had instilled an actual prejudice in the minds of jurors in this case, noted that the exclusion at retrial of information regarding his first trial such as his conviction by a community jury of the murder, his written confessions and trial testimony, his plea of temporary insanity, and his conviction of rape was meaningless when the news media made it available to the public and poisoned the general atmosphere of the community. See Sheppard v. Maxwell, 384 U.S. 333, 360 (1966).

The trial court responded to the defendant's allegation that this publicity had prejudiced the jurors against him by stating that "almost all, if not all, [of the first twelve jurors] jurors...had no prior or present fixed opinions." The Supreme Court of Pennsylvania summarily affirmed this equivocal finding of the trial judge with the general conclusion, absent specific factual findings or references to the record, that "these findings, fully supported by the record, do not sustain appellant's claim..."

and that "the record fails to disclose undue community prejudice." Commonwealth v. Yount, 455 Pa. 303, 314 A.2d 242, 247-248 (1974). The state's highest court went on to note, without reference to statistical analysis or specific voir dire testimony, that "neither does the voir dire, as appellant argues, reveal a 'clear and convincing' build-up of prejudice or a 'pattern of deep and bitter prejudice shown'...throughout the community which would require a change of venue." The common standards applied by Pennsylvania courts when exercising sound discretion to a request for a change of venue are:

> a. Whether pretrial publicity was factual and objective or inflamatory and slanted;
>
> b. Whether pretrial publicity revealed the existence of accused's prior criminal record;
>
> c. Whether pretrial publicity referred to confessions, admissions or reenactments of the crime by defendant;
>
> d. Whether such information was made available by the police and prosecutorial officers; and
>
> e. The extent of saturation and whether a period of "cooling-off" had occurred.

Commonwealth v. Cohen, 413 A.2d 1066, 489 Pa. 167 (1980), cert denied, 101 S.Ct. 118; Commonwealth v. Frazier, 369 A.2d 1224, 471 Pa. 121 (1977). However, the record in this case does not indicate that the trial court considered any but the first and last of these standards. The Supreme Court of Pennsylvania failed to provide any insight into how it arrived at its conclusion to affirm the trial court's findings; certainly, there is no evidence that any but the last of these standards was considered. Commonwealth v. Yount, 314 A.2d at 247.

Faced with a limited record of factual findings by the state courts, the federal magistrate held two evidentiary hearings on this issue, found that "strong community hostility toward petitioner" existed as well as "pervasive

community knowledge of the facts of this case," and concluded that the empanelled jury was incapable of deciding the case solely on the evidence before it "but rather at best required the petitioner to prove his innocence or at least overcome strong preconceived notions as to his guilt." The United States District Court refused the magistrate's recommendation. Yount v. Patton, 537 F.Supp. 873 (1982).

Because Yount was challenging a state conviction in a petition for writ of habeas corpus, the Court of Appeals, citing this Court's holding that the factual findings of the state courts are presumed to be correct unless shown to be erroneous by convincing evidence, see Sumner v. Mata, 449 U.S. 539 (1981), specifically recognized its duty as a federal appellate court to examine the "totality of the circumstances" for any indication that respondent's trial was not fundamentally fair and to "independently evaluate the voir dire testimony of the empanelled jurors and the potential jurors." See Dobbert v. Florida, 432 U.S. 282, 303 (1977). The court below not only was permitted by federal law (28 United States Code, Section 2254(d)) to review the mixed question of law and fact presented by the nature of a challenge to a venireman's opinion but was also obligated to conduct an independent evaluation of the record of the case. Irvin v. Dowd, Warden, 366 U.S. 717, 723 (1960). Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980).

Upon reviewing the record, the Court of Appeals found that respondent exhausted his peremptory challenges during voir dire; that 126 of 163 veniremen (80%) questioned on the case were willing to admit on voir dire that they would carry their opinion into the jury box; that attempts had been made to veil strong opinions and to influence votes among veniremen; that the publicity had reached all but one of the twelve jurors and two alternates finally em-

panelled; that several seated jurors specifically recalled the accused's conviction or confessions, that eight of fourteen jurors would admit that before hearing any testimony they had formed an opinion as to his guilt or innocence, and that jurors gave uncertain and ambiguous answers when asked if they could forget what they had heard and put their opinions aside. The court noted that "even such equivocal assurances of impartiality were preferable to the open admissions of prejudice made by Juror Hrin and the two alternates, who went 'so far as to say that it would take evidence to overcome their belief'...Murphy, 421 U.S. at 798."

The court below clearly rejected application of the standards cited in Marshall v. United States, 360 U.S. 310 (1959) to this case and dutifully applied the oft-cited requirements of 28 United States Code, Section 2254(d) and Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031 (1974), to its in-depth, independent review of the record. Recognizing the statistical similarity between this "cause celebre" case and Irvin, the Court of Appeals noted that "a juror's assurance that he can enter the jury box without an opinion is not dispositive if the accused can demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' Murphy, 421 U.S. at 800;" upon consideration of the extent and content of the publicity because it is indicative of the then-current community pattern of thought, review of the voir dire for opinions expressed by potential jurors and the difficulty encountered in finding veniremen who could at least claim impartiality, and, finally, discovery of a pattern of prejudice reflected in the testimony of jurors ultimately seated in the jury box, the court concluded that the jurors' assurances of impartiality had to be discounted. The Court of Appeals, responding to the factual findings of the trial court, rejected those findings and held that "petitioner

has established that the publicity before his second trial had revealed prejudicial information from his first trial, information which was not officially in evidence against him" and that he "has shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County."

Finally, the court below considered the question of law regarding the trial court's refusal to dismiss jurors for cause who had expressed a disqualifying prejudice and concluded that "the trial court refused to dismiss several veniremen who had expressed a disqualifying prejudice and permitted some of them to sit as jurors." Noting respondent's reasons for not challenging for cause nine of the seated jurors, the court held that "where as here a fair trial was impossible not because of a particular juror but regardless of the particular jurors, challenge of any individual juror for cause is not required." However, Judge Garth, concluded that the voir dire testimony of challenged juror, Hrin, demonstrated the actual existence of disqualifying prejudice in the mind of one of the jurors 'as will raise the presumption of partiality'..." Judge Garth determined that Juror Hrin's admission of a requirement of evidence to change his preconceived opinion of the defendant's guilt, as a matter of law, raises a presumption of partiality. "A defendant cannot constitutionally be convicted by a jury containing one such juror. Irvin v. Dowd, supra, 366 U.S. at 723."

The United States Court of Appeals for the Third Circuit was correct in its conclusion that pretrial publicity poisoned the general atmosphere in Clearfield County so as to create an actual prejudice in the jurors deciding this case that infringed on respondent's ability to select and impanel a fair and impartial jury. The Court was obligated

to independently review and evaluate the questions of law and fact relevant to the issue of opinions of veniremen and, if that investigation warranted, disregard the jurors' equivocal assurances of impartiality. In doing so, the court strictly adhered to the standards regarding juror prejudice as set forth in Murphy.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to review the opinion of the circuit court, should be denied.

Respectfully submitted,

George E. Schumacher
Federal Public Defender

590 Centre City Tower
650 Smithfield Street
Pittsburgh, Pennsylvania 15222
412/644-6565
FTS/722-6565

Attorney for respondent,
Jon E. Yount

CERTIFICATE OF SERVICE

I, George E. Schumacher, a member of the Bar of this Court, hereby certify that a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Respondent's Brief in Opposition were mailed to the following:

Thomas F. Morgan
District Attorney of Clearfield
County
P.O. Box 887
Clearfield, Pennsylvania 16830

Dated: August 12, 1983

George E. Schumacher
Federal Public Defender
Attorney for respondent,
Jon E. Yount

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v.

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Respondent

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS

Respondent, Jon E. Yount, pursuant to 18 United States Code, Section 3006(d)(6) and Rule 48.1 of the United States Supreme Court, asks leave to file the attached Brief in Opposition without prepayment of costs, and to proceed in forma pauperis. Pursuant to an appointment under the Criminal Justice Act of 1964, as amended, the Federal Public Defender's Office represented the petitioner in the district court and on appeal to the United States Court of Appeals for the Third Circuit.

Dated: August 11, 1983

Respectfully submitted,

GEORGE E. SCHUMACHER
Federal Public Defender

590 Centre City Tower
650 Smithfield Street
Pittsburgh, Pennsylvania 15222
412/644-6565
FTS/722-6565

Attorney for respondent,
JON E. YOUNT